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difference (in terms of content) from the DCFR itself is that the individual PEL volumes contain comparative introductions to individual chapters and translations of the Articles themselves from English into the other 16 languages of the Member States. In this volume such introductions are provided for the first three chapters ("Fundamental provisions", "Legally relevant damage", "Accountability"), though not for subsequent chapters (on "Causation", "Defences", "Remedies" or "Ancillary rules"). In his Foreword to this volume, Professor von Bar also notes more generally that there are "occasionally small discrepancies between the model rules published in this series and those of the Draft Common Frame of Reference" (xi), explained by him as primarily a consequence of the PEL volumes having been conceived as self-contained treatments, and also because the drafting of the final DCFR text was able to take account of earlier criticisms made of the model rules in the PEL series (the relationship of the PEL to the history of the DCFR project is also narrated at paras 45-47 of the Introduction in volume 1 of the DCFR itself).

Although the PEL volumes are far from inexpensive, they provide to a very limited extent a (relatively) more affordable way of acquiring select parts of the full DCFR with commentary than purchasing the DCFR itself, which few are likely even to consider, given its exceptionally high price of £750. That said, the DCFR edition is still better value than it would be to purchase all the PEL volumes individually, and the reality is that the marketing of both the DCFR and PEL seems to be directed towards institutional purchase. However, even for institutional purchase these prices are high. The marketing and publishing strategy behind the wider dissemination of the DCFR thus seems puzzling, except perhaps from the commercial point of view of the publishers. It is surely legitimate to feel some consternation about this.

This reviewer has not tried to establish whether there are any of the occasional "small discrepancies" between the DCFR and the PEL in the volume under review, and perhaps Professor von Bar could have addressed the matter by offering some more detailed guidance on these discrepancies, and whether any feature in this volume. It is also confusing that the Oxford University Press catalogue does very little to explain helpfully the difference between the DCFR and the PEL volumes, and this can only really be gleaned from reading the Foreword in the case of the volume under review. Given that the two projects and their publications could hardly be more intimately related and yet are not identical, this is regrettable. It should also be explained (though not easily apparent from the book itself or the publisher's catalogue) that the books in this series are published simultaneously (but with different ISBN numbers) by Sellier (Germany), Bruylant (Belgium) and Stämpfli (Switzerland), though it is worth noting that the Oxford version seems by a significant margin the least expensive. Overall, this volume is clearly an impressive achievement. The PEL series should help with the important task of disseminating the DCFR and its commentaries. Moreover, the availability of the individual PEL volumes will be welcome to those who wish to work from a personal copy in their own areas of interest and are prepared to pay.

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Brian Coote, CONTRACT AS ASSUMPTION

Oxford: Hart Publishing (www.hartpub.co.uk), 2010. xxviii + 217 pp. ISBN 9781849460293. £29.99.

This work brings together a number of essays on contract law (prefaced by a newly written introductory chapter) which were previously published by the author as separate journal

articles between 1964 and 2006. The essays are linked thematically by the central thesis that contract is best explained as an act by which the contracting parties mutually assume obligations towards each other. To grasp this thesis the reader could simply confine him- or herself to reading chapter 1, where Coote's theory is fully expounded and differentiated from pre-existing theories of contract law. However, a reading of the later chapters provides illumination of the theory within the context of specific aspects of contract law, aspects shown in a new light by the idea of contract as assumption. The essays included cover a range of topics: the doctrine of consideration (chs 3-5), exception clauses (ch 6); fundamental breach (ch 7); damages and the performance interest (ch 8); transferred loss claims and the performance interest (ch 9); third party rights (ch 10); and assumption of responsibility and pure economic loss in New Zealand (ch 11), a jurisdiction with which Coote is well familiar, being an emeritus professor of law at the University of Auckland.

Coote states, by reference to Charles Fried's famous work, *Contract as Promise* (1981), that he "accepts that contracts are made up of promises and that promises involve assumptions of obligation" (1). However, the focus of Coote's own work is not, as with Fried's, the foundation of contract law upon the morality of promising, but rather upon the idea of the voluntary assumption of obligations, of which Coote sees promise as merely an expression or form. Contract law is, for Coote, a facility which parties may choose to use, the liabilities achieved using this facility not being imposed or incurred but rather intentionally assumed (intention is a "central requirement" of contract law for Coote, rather than a peripheral matter). The focus on intention and assumption allows the requirement of consideration to be cast in a new light by Coote—it is the exchange of mutual assumption of contractual obligation which is (or at least ought to be, on Coote's view) the consideration of a contract (3). Coote is not so radical as to jettison consideration altogether (such reticence arguably resulting in some problems discussed below), but his equation of consideration and assumption of responsibility is radical enough to take Coote's theory of the Common Law of contract some way towards that of the other great Western legal families. Lawyers from both "mixed system" and Civil Law traditions would be likely to recognise more of their own systems in an English contract law built upon Coote's theoretical approach than upon traditional Common Law theories. The Scots lawyer, for instance, would be likely to agree with Coote that the basis of contract law lies in an assumption of legal duties—such, after all, was Stair's understanding of the essence of contract as resting upon the voluntary undertakings of the parties—and the German lawyer could easily accommodate Coote's central idea within a Germanic understanding of contract as based upon the declarations of will (*Willenserklärungen*) of the parties to the contract.

Coote's theory leads him to reach a number of conclusions which, for many common lawyers, will seem radical. In chapter 4, for instance, Coote argues that his theory, dispensing as it does with a requirement for consideration other than the intention of the parties, would solve the difficulties which the Common Law traditionally encounters with contractual variations. No longer would convoluted arguments of the type seen in *Williams v Roffey* [1991] 1 QB 1 be required to justify variations to contracts unsupported by traditional forms of consideration: a clear intention by the parties to undertake an effectual variation of the contract would suffice, an idea which, Coote explains, the New Zealand courts are already moving towards. Such a development would be a most welcome one, though I have argued elsewhere that the more radical step of dispensing entirely with the requirement and language of consideration would be the simplest and most decisive way of, among other things, enforcing all seriously intended contractual variations in English law (see Hogg, "Promise: The Neglected Obligation In European Private Law" (2010) 59 ICLQ 461).

Coote's central thesis is certainly a breath of fresh air for the Common Law of contract, and takes a commendable approach to the importance of personal liberty and freedom of action,

stressing as it does the voluntary intention of the parties as the constitutive means of assuming an obligation. The thesis also has the attraction of building on what has gone before. Thus, Coote does not reject out of hand promissory ideas about contract law, but rather suggests that what is crucial to a legally relevant promise is that the promisor is assuming an obligation in the act of promising. In so suggesting, however, Coote controversially rejects the idea that promises are confined to undertakings concerning future acts or abstentions from acting: on his view, one can make promises about past facts, these being none other than assumptions of obligations about those past facts (39). Many will feel that this stretches the idea of promise beyond long-standing and culturally ingrained notions of the institution of promising, the present writer among them. Contrary to Coote's view, I argue in a forthcoming work (*Promises and Contract Law*, Cambridge University Press, forthcoming, 2011) that it is central to the idea of promise that A is pledging a future performance in favour of B; the assertion of a past or present fact is per contra a warranty, the making of which, while it may give rise to an obligation, can be distinguished from a promise.

Given the breadth of time over which the various chapters forming Coote's book were originally published in article form (some forty-two years between first and last), the thesis of contract as assumption inevitably comes over more clearly and in a more developed fashion in the chapters which were published more recently, reflecting the author's development as a thinker. Thus, for instance, in the chapter (on exception clauses) first published in 1964, there is a much more muted exposition of Coote's central thesis than one finds in his introductory chapter, though the message of the chapter – that exception clauses are intentional limitations on the rights arising at the outset of the contract, rather than mere shields to claims based on accrued rights – is clearly consistent with a theory of contract as a voluntary assumption of obligation, and of contracting parties as free agents able to determine which obligations they assume. Some might feel that the inclusion of this chapter, written four decades before the later material, somewhat interrupts the overall flow of the work, given the relatively undeveloped nature of the central thesis within it; on the other hand, as the work is explicitly a collection of essays on a theme, the fact that the chapter fits within Coote's overall theory seems a defensible reason for its inclusion, and its inclusion can be argued to help demonstrate the development of Coote's ideas over the extended period of his academic writing.

Reference was made earlier to Coote's equivalence between assumption of obligation and consideration. This allows him to avoid some traditional Common Law problems (such as those associated with variations of contract unsupported by valid consideration), but the rejection of the alternative and simpler argument that consideration should be dispensed with altogether produces some awkward results for Coote's approach. One such result is Coote's fondness for the idea, developed in the Common Law of torts, of an "assumption of responsibility" by a party as a ground for imposing tortious liability for pure economic loss. Coote's idea of contract as based on an assumption of obligation, and the judicial idea of a tortious assumption of responsibility, have evident parallels. To most this would be worrying, as an acceptance of the validity of both Coote's thesis as well as of the idea of assumption of responsibility in tort must lead inevitably to a blurring or merger of contract and parts of tort. Coote acknowledges that the idea that tortious liability can be assumed voluntarily "may appear counter-intuitive" (193), as indeed it does, but he nonetheless defends the idea rather than attack it (as the present writer would have). Why? Because, Coote argues, it allows tort law to fill gaps in the Common Law resulting from the doctrine of privity of contract, something which "might even lead to the eventual development of what, in effect, if not in theory, would be a new form of contract for which consideration was unnecessary" (203). This is a worrying defence of assumption of responsibility in tort: rather than simply argue for the abolition of consideration as a formal requirement of contract law, thus allowing all seriously intended voluntary undertakings to

constitute contracts rather than force them into the tort box, Coote has instead led himself into defending a blurring of the fundamental division between voluntary and involuntary obligations in order to try and work round the problems caused by a consideration requirement. Despite promising signs of a willingness to embrace fully the radical agenda of contract as assumption, in the end he seems unable fully to throw off the shackles of consideration. The result is an endorsement of the distorted solutions the Common Law employed to deal with the unwelcome results of a doctrine of consideration that Coote might so easily have jettisoned when advancing his new theory of contract.

There is much to commend in this work. The idea of contract as assumption is an attractive one, not least of all because it can accommodate the notion of promise (though not all would agree in precisely the way defined by Coote) as a means to effect such assumption, as well because it supports personal freedom and responsibility, values much underplayed in contract theory in the 1970s and 1980s. If Coote's thesis has a principal weakness, it has been argued to be that it is not radical enough. Coote clings to consideration, albeit in a recast form, when a theory focusing on seriously intended assumption of obligation is surely one in which the idea of consideration is superfluous. Consideration appears to offer nothing of use to contract theory once the focus has rightly been found in the serious intentions of the parties to be bound to an obligation. It may be that Coote's view is that an outright rejection of consideration would simply be too radical, and that for any contract theory to stand a chance of receiving judicial approbation it must at least attempt to meet the courts half way. If that is so, it is a pity; the elegance of Coote's theory is somewhat distorted by the need to accommodate consideration within it, and to argue that consideration ought to be abolished would hardly be the shocking argument that it once may have been. Despite this arguable weakness, this collection of essays remains a stimulating and worthwhile read. Its publication serves as a reminder that there are those within Common Law academic circles willing to think radically about contract theory, in ways which offer the genuine possibility of fashioning a theory which might serve not just the Common Law but the other legal families also.

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Catharine MacMillan, MISTAKES IN CONTRACT LAW

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The doctrine of mistake continues to perplex, frustrate and fascinate contract lawyers in equal measure. When, in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679, the Master of the Rolls, Lord Phillips, was driven to remark that "[i]t has been a fertile source of academic debate, but in practice it has given rise to a handful of cases that have merely emphasised the confusion of this area of our jurisprudence" (at 725), he could have been talking about the doctrine of mistake more generally and not just the distinction between common mistake in Law and Equity. Catherine MacMillan seeks to address some of these problems or, as she puts it, why "the form of the common law doctrine of mistake is itself largely a mistake" (2) by taking a long view. The doctrine of mistake in its modern form was a Victorian invention. But it was one with a complex pedigree.

MacMillan begins the story of mistake in Ancient Rome with enough contextual information to be accessible to readers without any grounding in Roman law. The tale is continued through the Glossators, Neo-Scholastics and finally the Natural lawyers. Chapter 2 concentrates on